1953

George Roth v. Albert Roth : Brief of Respondents

Utah Supreme Court

Harvey A. Sjostrom; Attorney for the Defendant and Respondent.

In the Supreme Court of the State of Utah

In the Matter of the Estate of George F. Roth, deceased.
George Roth, Petitioner and Appellant,

vs

Albert Roth, defendant and Respondent.

Respondent's Brief
Case No. 8040

Appeal from the District Court of the First Judicial District of the State of Utah
In and for the County of Cache

Hon. John A. Hendricks, Judge

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Attorney for the Defendant and Respondent.

INDEX

AUTHORITIES CITED

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STATEMENT OF FACTS

This is only an Appeal by George Roth; Janie Roth does not appeal from the Judgment and Decree.

We agree with appellant on his statement of facts up to and including that portion of page 4 which states that pleadings were joined and the trial was had before Honorable J. A. Hendricks at Logan, Utah, with the single exception that defendant had more than occupancy of the property in question, he had possession as admitted in appellant's pleading (R 6). There is also a slight mistake in description of property but of course proper description was intended. In regard to George demanding an accounting as stated pp. 2 and 3 of appellant's

brief, it will be observed that it was not until Albert Roth had caused to be sent to George Roth and his wife, Janie, a quitclaim deed (def. exhibit 2) for their signatures that George Roth through his counsel sent Albert a letter (def. exhibit 3) and among other things he wanted to know the appraised value of said real property in controversy. In reply to said letter Albert caused letter (def. exhibit 4) to be sent and which informs George Roth of the appraised value of the real property which was $1800.00 and in which he further recites the payment of $400.00 leaving a balance of $500.00.

As is mentioned in appellant's brief the said Emma Roth was the step-mother of Albert and George Roth, but George Roth testified more extensively than is indiciated in appellant's brief and without this added testimony a misunderstanding might be had of its import. George testified that what he was to receive was fifty-fifty matter to be based upon the appraisal of his father's estate and that payment was not to be made until step-mother's death (R46). The real property was appraised at $1800.00 (R2,53). That there was talk of sale at time of father's death in 1935 is also admitted by George Roth (R45,46). George Roth further testified that his wife came to Providence and got $400.00 from Albert; that he did not send his wife to get it (R47); that he authorized her to give a receipt for the money; that he (George) had not jointly made the receipt out; that the signature of George Roth on the in-

strument def. exhibit (1) was his signature and that Albert Roth May 27, 1949 is in his handwriting (R 48, 49) Note the apparent contradiction of George's testimony) Albert Roth testified as follows in addition to what is given in appellants brief under statement of case. Albert Roth testified that after their father died (which was in 1935) that George told him he didn't want the place and that Albert was to pay him his half; that he, Albert, could pay it as circumstances permitted and that he could pay the balance at time of stepmothers death; that a couple of weeks prior to the giving of the receipt (def. exhibit 1, admitted in evidence R. 54); that he told Janie Roth that he had some stock and expected enough out of it to pay for half of the property (R 52); that the real property was appraised at $1800.00; that Janie came up and asked about the money; he got a cashiers check which he handed to her; she pulled out her receipt book and says "George only made out a part of it, you fill out the balance of it." "She signed her name and tore out the leaf of her book and gave it to me."; he thought there was a carbon copy (R 53, 54); that in December 1951, Attorney Wight and George came to Providence and said that property had gone up and wanted more money; that he never said anything for he figured that settlement was to be had on the $1800.00 appraisal. "I asked Mr. Wight if the property had gone down, then I would have been stuck." He says "I don't know (R 55). Albert, further testifying: "I says, It looks to me like whether the property

had gone up or down, I am going to get stuck." He says, "it looks that way". Appellant did not see fit to testify for himself on this. Albert put roof on house, hot water system, linoleum, fixed roof on barn in 1949-50 after it caved in, painted house, put in lawn (R 57, 58) Some $700.00 worth as put by appellant in his brief (at pp. 14)

CROSS OF ALBERT ROTH

In addition to what appellant refers to as cross-examination of Albert, Albert also testified as follows:

Q. "You say that you and George entered into an agreement in 1935?"

A. "We took it over. We tried to get an appraisal of what we was going to do with the place. I just told him that we ought to have the property appraised to find out how much it was worth, before I was to buy his half".

Q. "That was in November, was it.?" A."Yes, sir."

Q. "That was fifty-fifty?"

A. "Yes."

Q. "On a fifty-fifty basis, that was your understanding."

A. "That was my understanding." (R 60)

Then, too, there is the very significant conversation between appellant and respondent at the time of step

mother's death in 1951 in which respondent said that he owed appellant more money on the place and that "about the only thing I can think of about the property is to mortgage the property" and pay it off. (R 61)

Further testifying on cross:

Q. "There was a conversation I would like to clear up."

A. "Your conversation, yes, you came up here and you say that you thought that you should have more money, that the price, the value of the property had gone up, and that I should pay more money" (R 62) It was further agreed that a complete settlement should be had at step-mother's death. (R 64)

Afton Roth—witness for respondent.

Afton Roth testified that she had a talk with appellant Roth and that he (appellant) told her "you don't have to think that you have to give my wife money whenever she mentions it, or whenever she says that we need money". (R 66) This was about 2 weeks before Janie Roth actually got the money. (R 65)

Janie Roth—Direct

In addition to Janie Roth's testimony noted in appellant's brief Janie testified she gave the cashiers check to her husband George Roth who cashed it. (R 73)

On Cross Janie Roth testified

Janie Roth although testifying on direct examina-

tion that she didn't look at the receipt, (def. exhibit 1) yet on cross testified as follows: Q. "Albert, or George wrote this, four hundred dollars, or Albert wrote that?"

A. "Yes, sir."

Q. "Five hundred dollars balance, he wrote that?"

A. "Yes, sir."

Q. "You saw him write that didn't you?"

A. "Yes."

Q. "This is Albert's writing on that — I mean George's, writing?"

A. "Yes, sir."

Q. "And George wrote that?"

A. "Yes."

Q. "And then, here, you say Janie Roth is not your signature?"

A. "This is my writing here. This is not my "R" (R 74, 75)

Albert Roth — recalled

Albert Roth testified that Janie Roth had a receipt book when she came to Providence and that he saw her write her name on the receipt after he had completed the receipt. (R75, 76) Albert further testified: "This prior arrangement that made out at the gate when they were up the week before. I told her that, at the gate,

I owed nine hundred dollars, I would be willing to pay part of that, as much as I could borrow that to help them. I didn't have to make the loan."

ARGUMENT

Point 1. Appellant states under point number 1 that answer and counterclaim fail to state facts upon which relief can be granted. Respondent disagrees and believes that a mere reading of said answer and counterclaim will show appellant in error. True, as appellant states, the agreement lay in parol, but is also bottomed by a very substantial payment of $400.00. Improvements were, as stated by appellant at about $700.00 (appellant's brief 14) but which improvements appellant calls "slight". On a $900.00 deal they seem to the appellant to be very substantial and which respondent, Albert Roth, testified he would not have made unless he was going to have the place (R 58). There is no evidence, whatsoever, that the improvements were to be treated as rent to Emma Roth. If appellant had had the slightest belief that it was he would certainly have developed it on trial as he was appraised of the claim of improvements, part payment, and possession by respondent in the pleadings as taking the case out of the statute of frauds and that statute had no application to the facts of this case. Though the improvements were made prior to the May 27, 1949, the time the court found the sale was actually made, they were certainly made after there was an agreement to sell in 1935. Appellant concedes

that substantial improvements is evidence of reliance upon a contract so we will quote no authority.

There is another argument that we shall urge at the end of our arguments to the points set out in appellant's brief which is common argument against all points set forth by appellant.

Point 2.

Appellant claims the evidence is insufficient to support the Findings. In this, too, we disagree. At the time of the father's death in 1935 appellant said he did not want the place and Albert said he would take it. Payment was to be made after the death of the step-mother (R 46, 51). As to the price, that was determined by the appraisal of the property (real) which was $1800.00 (R 2, 5, 53). George was to be paid ½ of the appraisal and according to his own testimony it was to be a "fifty-fifty proposition" (R46) And, Albert testifying said that in his talk with George at the time of his father's death that he was to pay appellant "his half". To which appellant said, "that was agreeable to him". (R51) At the time of step-mother's death in May of 1951 in a talk with appellant and in answer to the Court, respondent testified as to that talk as follows: "I suppose we will have to make a settlement" I says "I don't want to sell my cow or what I have got, there would not be enough out of it to pay you." I says, "I will have to mortgage the property and get it from the bank." "I told him I could get the money from the

mortgage and send it to him." (R 55) Later in December of 1951, Attorney Wight and respondent came up and wanted more money, saying the property had gone up. That remark drew from the respondent that though the property went up or down he was to "get stuck." Wight answering sys, "it looks that way." (R54, 55, 56).

It is most peculiar that appellant denies sending his wife to get any money from Albert and at the same time says that he authorized her to give a receipt for the money received; that it was his signature on the receipt; that "Albert Roth, May 27, 1949," was his hand writing; that the name of Janie Roth on the receipt looked like his wife's hand writing (R48, 49). That appellant authorized his wife to obtain the money there can be no doubt and that the money was paid for the property in question is not even open to reasonable dispute. Why else would the receipt read "Received of Albert Roth, four hundred and no/100 Dollars, $500.00 balance due". That is not the language of a party obtaining a loan as appellant would now have this Court believe, but is the language of one getting payment and still having money coming which by the way respondent was not even obigated to pay any part according to an understanding of the parties in 1935 as the step-mother was not then deceased. Appellant points to the alleged fact that no conversation in regards to the property had taken place from 1935 to 1951, between appellant and respondent.

It will be noticed, however, that respondent's wife, Afton Roth, testified that about 2 weeks before respondent gave the $400.00 to appellant's wife that she had a talk with appellant and in which he said: "You don't have to think that you have to give my wife money whenever she mentions it, or whenever she says we ned money." (R 66) Can it be doubted that this bit of advice given to respondent's wife by appellant had any reference to anything but payment for the property in question and on an agreement well understood by appellant and his wife? We believe not. Appellant did not see fit to take the stand in his own behalf to deny or qualify this or say that this had reference to a loan and not the alleged sale of the property. Then, too, if both appellant and respondent are to be believed as to an understanding in 1935 that respondent was to have the place further conversation was uncalled for as to payment until the death of Emma Roth.

Another matter taken up by appellant was that there was no conversation as between appellant's wife and respondent concerning the sale of the property in question. This is not so for two weeks before the receipt was given (May 27, 1951) appellant and his wife visited respondent in Providence where Janie informed respondent that George was in need of money as he had to have mdical attention and it was taking lots of money and if he could help them out. That he told her that he had building and loan stock and "expected enough to make

up to pay off this obligation to pay for half of the property''. (R 52) Then, too, when Janie gave Albert the reecipt introduced (Def. exhibit 1) which said in part ''balance due $500.00'' it is hard to believe that she did not know and agree to with the contract as alleged and proved by respondent. Here we then have an agreement certain and specific in its terms and meets every requirement as laid down in Hargraves v. Burten, 59 Utah 575, 206 P. 262 for specific performance. So we maintain that the evidence is sufficient to support the findings of the Court.

Point 3.

Appellant complains that the ''Findings and Conclusions are insufficient to support the Decree.''

We believe that both Findings and Conclusions support the Decree of the Court. A mere reading of paragraphs 5, 6 and 7 of the Findings taken with the balance of the said Findings sufficiently support said Decree. Paragraph 5 states that ''That on May 27, 1949, an oral agreement was entered into between Albert Roth, as buyer and George Roth and his wife, Janie Roth, as sellers, whereby the sellers were to receive the sum of $900.00 for their undivided one-half interest in the aforesaid described real estate, and the buyer agreed to pay $900.00, and paid $400.00 to the sellers and received a written receipt stating that there was a balance due of $500.00''. In paragraph No. 1 the property is described and to which paragraph 5 refers (R24, 25, 26). So there

was a substantial payment in pursuance of the agreement alleged by respondent. As to the argument of appellant that Findings do not find that respondent took possession it seems sufficient to say that the Court found that upon the death of Emma J. Roth in May, 1951, the said real property "reverted to Albert Roth". Certainly this is a finding that in as much that possession ceased in Emma J .Roth, it commenced and was in respondent. Then too, in appellant's Statement of case he conceded that Albert Roth occupied the premises to the present time. (Def. Brief 2) Also in his pleadings he concedes that respondent has had possession since the death of Emma Roth on the 30th day of May, 1951 (R 6) Respondent denies appellant made any off the record offer for the property.

Point 4.

Appellant contends that "the court should have applied Appellant's plea of the Statute of Frauds—Section 33-5-2 Utah Code Annotated 1943.

It is our contention that the Statute of Frauds has no application to the facts in this matter. It is true that the contract of sale between the parties lies in parol bu there there was a payment of $400.00 to George Roth and his wife on the sale followed by exclusive possession which is sufficient (Marfield v. West 6 Ut. 327, 23 P. 754; Allen v. Allen 30 Ut. 104, 166 P. 1169) For the plaintiff to claim that it was a loan does not square with the receipt given which states that there was a bal-

ance due of $500.00. If it was a loan, certainly the phrase "balance due $500.00" would not appear on the receipt. Then too, George Roth, the petitioner in this matter testified that it was a sale as did Albert Roth. Also the wife of Albert Roth testified that sometime before the $400.00 was paid George Roth told her that they need not pay merely because his wife Janie asked for it. This is not the language of a party seeking a loan when viewed in the light of previous conversation running back as far as the death of the father in 1935 and which necessarily must be taken into consideration as to a culmination of sale in 1949 when reecipt was given. So it is our contention that it was part payment on the place in question and a very susbstantial one when we consider the full price was $900.00 or one half of the appraised value of the father's property. The receipt shows conclusively what the full price was and in connection with this we may say that the testimony given by Janie Roth that she did not see the receipt after Albert had written the amount paid and that due is not tenable as is the further testimony of hers that the name Janie Roth appearing on the receipt was not her signature. Not only did her husband testify as to his own writing and signature appearing thereon but he as well as Albert Roth testified that her name appearing thereon was her signature as has heretofore been pointed out.

Some mention is made in petitioner's brief that the

terms were too indefinite to constitute a contract or sale and thus not susceptible for a decree of specific performance. We hardly see how they could be more definite as there was a complete understanding between the parties as to the property involved including payment. Certainly no one will contend that because the exact date or dates when the agreement was made could not be stated that that would make it void or voidable.

Appellant speaks of the contract not being equitable. The evidence shows, however, that Albert was buying one half of the remainder of said property, but he agreed to pay $900.00 which obviously was more than the remainder was worth because possession would be in the mother until her death unless she turned it over to Albert which would be no concern to petitioner. It will be recalled that Albert was to pay one-half of the appraised value of the property. It will be further recalled that after the pleadings were filed in this matter by both parties the petitioner's counsel, Wight, and petitioner call on Albert and in the course of the conversation Attorney Wight said that the property had gone up since the agreement and therefore more money should be paid. In reply to that Albert asked him in the presence of petitioner what if the property had gone down and Wight said in effect that that would be too bad for Albert.

Something also is said in petitioner's brief that George's wife, Janie, was not ware of the deal. This

is indeed a peculiar statement when both she and her husband came up to Logan about 2 weeks before the $400.00 was paid and asked about payment. Albert's rejoinder to this request was that he would have to get the money from the Logan Building and Loan and that he would send it down to them. After making such a statement he thought that he should have some sort of receipt and therefor decided to go down in person. However, before he could get around to it Janie came up and gave the receipt with its reading part "$500.00 balance due" and received the $400.00. And to claim now that she did not consent and agree to the sale is unreasonable and unwarranted.

After the death of the father in 1935 George offered his one-half interest in the remainder for what the appraised value of the property would show. When Albert paid the $400.00 in 1949 the deal and sale was then certainly closed if it had not been before because of improvements made followed by payment and possession as when the mother died he assumed exclusive possession of the same in pursuance to the sale with consent of appellant. (R 61) This is sufficient to take the matter out of the statute and we cite in support thereof the following notes in Vol. 2 on pp. 649 Ut. Code Annotated, 1943, "A parol partition between joint owners of real property, when carried out and followed by actual possession in severalty of the several parols, is valid and will be enforced notwithstanding the sta-

tute of frauds. Allen v. Allen 50 Utah, 104, 166 P. 1169."

Petitioner quotes certain authorities in regards to the necessity of certainty of parol agreement. We contend in addition to what we have already said that everything has been met as to certainty, etc., but instead of particularizing in all matters referred to we cite this court and appellant to Volume 49 A.J. pp. 34, sec. 22 to 33 inclusive on this phase of the case and as to the inequities that is referred to I refer to same volume pp. 72 sec. 58 to 65 inclusive. The text contained in said sections is a complete and full answer to petitioners contention but we particularize to an example or two. If it can be said that the exact time is not stated as to when the balance owing should be paid (but it was at step-mother's death) it is implied that performance may be required within reasonable time. Pegg v. Olsen 31 Wyo. 96, 223 P 223, 136 A.L.R. 142 Leaf v. Cod 41 Idaho 547, 240 P. 593. The same is true of interest when nothing is said as to the percent the legal rate will be presumed to have been intended 37 A.L.R. 361. This is assuming that any interest at all was intended by parties which there was not in this case. If it can be said that appellant made a bad bargain that is no reason for the court to refuse specific performance. Am. Jur. Volume 49, sec. 60, 63, 64. But it was not a bad bargain as respondent was to pay one half of the appraised value of the property which was

$1800.00 but which was subject to a life estate in step-mother. It would seem that it was a very good bargain for appellant.

As to the contention that Albert Roth has an adequate remedy at law American Jurisprudnce in same volume pp. 186 says "that as a general rule, the court presumes that remedy at law is inadequate in case of contract to convey land." We showed that Albert not only paid the $400.00 but put expensive improvements on the property in question because of his deal with petitioner and which justified him in so doing and that the property means much to him because it had been his home. It is a unique piece of property to him which cannot be compensated for in damages or merely the payment of money.

It is an elementary matter of law that through the trial court bottoms its judgment erroneously yet it will be sustained if the lower court could have bottomed its judgment on proper grounds. (Corpus Juris Vol. 4 pp. 1132 Section 3125)

Point 5.

It is further contended by appellant that the court improperly changed its decision after court adjourned and this is assigned as an error. Of course this is not error nor is it unfair to anyone. The judge after further reflection upon the case decided that he was in error and modified his former decision.

Respondent's Statement of Additional Points

Point 1. The Notice of Appeal is limited and bars consideration of points raised by appellant.

Point 2. No point is made by appellant of the lower courts denial of a new trial to appellant and is therefore a waiver of grounds raised under motion for a new trial and a bar in consideration of points raised.

Argument

Point No. 1

Attention is called to the form and contents of appellant's Notice of Appeal which besides stating court and matter reads thus: "Notice is hereby given that George Roth, petitioner and appellant named, hereby appeals to the Supreme Court of the State of Utah from that Judgment and Decree, by which George Roth was allowed only $962.50 for his portion of the Estate of George F. Roth, deceased entered in this action on the 6th day of November, 1952." From this language it seems to clearly appear that appellant only appeals from that part of decree and judgment which allows him only $962.50" for his portion of the property in question. He does not appeal from the judgment and decree of the lower court in ordering he and his wife, Janie Roth, to depositing a quitclaim deed with the Clerk of the Court of the property in question which the Clerk of the Court is ordered to surrender to respondent upon he depositing with the Clerk the sum

of $562.50 to be delivered to appellant for the said property. (The respondent had already paid $400.00 as heretofore noted.)

Having thus limited himself can he now be heard on any other or all of his statement of points? We think not. Would he not now be confined to a single point (if he had made such a point) under his Notice of Appeal to the alleged insufficiency of the money awarded him in the Decree and Judgment? In other words, his Notice of Appeal finds no fault with any other part of the Judgment and Decree. He only excepts to the supposed insufficiency of the amount allowed him and no point is made of this alleged insufficiency under his statement of points. It is stated in volume 3 Am. Jur. pp. 363, sec, 822 that: "Where the appeal is from only a part of a decree, that portion not appealed from cannot be reviewed", citing cases. It would therefore seem that the question is jurisdictional and if that be so there seems nothing for this court to do but to dismiss the appeal as to the points raised by appellant as to these points and that would seem to dispose of the case.

Point 2. No point is made by appellant of the lower courts denial of a new trial to appellant and is therefore waiver of grounds raised under the motion for a new trial and a bar to the consideration of the points raised.

It will be noted that appellant made a motion for

a new trial on two grounds, to wit: (1) Insufficiency of the evidence to justify the decision and the same is against law, (2) Error in law. (R 30) It will be further noted that a motion for a new trial was denied on the 7th day of May, 1953, (R 37) By failing to make a point of this denial it seems to us that it precludes a hearing on the points raised for it seems true to us that the points raised must necessarily come under or be premised on the grounds that were raised in the request for a new trial, and having failed to do so, if the same was not a mere oversight, seems to preclude consideration of the points by this court. For as pointed out in Bennett vs. Root Furniture Co., 176 Ind. 603, 96 N. E. 708, the failure of appellant to urge in his brief error in overruling a motion for a new trial, waived the determination of error in rulings on instructions and evidence required to be raised by such a motion. To the same effect is Green County vs. Lattas Creek Company, (Ind A.) 74 N.E. 633 which says in effect that an assignment of error to the overruling of a motion for a new trial on the grounds that the findings of the court are not sustained by sufficient evidence and that the decision of the court is contrary to the law, is waived, where the motion is not set out in appellant's brief and the evidence is not brought into the transcript. Here we have the evidence it is true but no point of the fact of the denial of a new trial.

Conclusion

In conclusion respondent says that a definite a-

greement of sale was made in May of 1949, when the receipt was given stating that there was due the balance of $500.00, and on which receipt appears the name of George Roth and ~~Emma~~ JANIE Roth his wife and followed by exclusive possession at the time of Emma Roth's death in May of 1951 with the consent of the Roths for at said time Albert Roth said to George Roth, "I guess I owe you some more money on this property." "I says, 'I don't know how much I could get, unless I sell my cow; I don't know whether I can get enough to pay for it." "I says, 'about the only thing I can think of about the property is to mortgage the property." George did not take the stand on the matter to deny it and therefore from the language here used there must be read into it the consent of appellant that Albert have possession. But if it can be successfully argued that the sale did not take place at the time found by the court we urge that it took place in 1935 when the father died at which time appellant said he did not want it and respondent said he would take it and pay half of the appraisal of the same at the time of Emma Roth's death and which was agreed to by appellant as has heretofore been pointed out. This was followed by improvements as appellant admits totaling about $700.00 and payment of $400.00 in 1949 and possession in 1951 with the consent of appellant. As to the $400.00 which appellant urges was a loan in addition to what we have already said in that regard there may be added that if a loan had been intended in 1949, appellant, we be-

lieve would have sent up a note already signed by him, instead of a receipt which had his signature already upon it and which note would have stated when the alleged loan was to be repaid. It must be further born in mind that there is no testimony that appellant ever thought of repaying the now claimed purported loan.

This Court has held upon numerous occasions that it will not disturb the findings of a lower court if there is any evidence to substaintiate it's findings, conclusions and judgment even though in such matters they differed with the opinion of this Court unless it could be further said that there was an abuse of discretion in the court below.

In addition to what we have already said in our Conclusion there is the further fact that appellant by limiting his appeal and a further failure of stating as one of his points for reversal of judgment the denial of the court of his motion for a new trial seemingly bars the points made from being considered by this Court.

We respectfully urge therefore that the Court should dismiss the appeal and affirm the judgment and decree of the court below.

Respectfully submitted,
Harvey A. Sjostrom
Attorney for Defendant
and Respondent.

Perhaps we should suggest here that appellant has died since this appeal was taken.